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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

G.A. MUELLER, Warden, California State Prison at Folsom,
Petitioner,
v.
JEFFREY WELTON NUNES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2254(e)(1), which provides that a state court factual finding shall be presumed to be correct in a habeas corpus proceeding unless rebutted by clear and convincing evidence, may a federal court refuse to give deference to that factual finding because the state court did not hold an evidentiary hearing, without determining whether clear and convincing evidence rebuts the finding?

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PETITION FOR WRIT OF CERTIORARI

G.A. Mueller, Warden, California State Prison at Folsom ("State"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 350 F.3d 1045 (9th Cir. 2003). App. A. The federal district court magistrate judge's findings and recommendations, App. B, and the district court's order adopting the findings and recommendations, App. C, are unreported. The opinion of the California Court of Appeal, First Appellate District, Division Two affirming the judgment of conviction is unreported. App. D. The order of the California Supreme Court denying review is unreported. App. E.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed December 1, 2003. The Ninth Circuit denied a petition for rehearing and rehearing en banc on February 2, 2004. App. F. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13(3).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

1. In 1989, respondent Nunes was charged with murder and multiple counts of assault with a firearm. Three trials resulted in two hung juries and a verdict overturned on appeal. At a fourth trial in 1993, Nunes was convicted of second degree murder. He was sentenced to imprisonment for 17 years-to-life.

2. On direct appeal and in an associated petition for writ of habeas corpus, Nunes argued to the California Court of Appeal that his trial counsel's failure to adequately communicate to him a pretrial offer to plead to voluntary manslaughter in exchange for an eleven-year prison term constituted ineffective assistance of counsel.

3. Without holding an evidentiary hearing, the California appellate court found no prejudice from trial counsel's assumed deficiency and concluded that Nunes's factual showing in support of his collateral attack did not establish prima facie a reasonable probability he would have taken the offer if it had been properly communicated. The state appellate court specifically found factually inadequate Nunes's self-serving declaration on this point, because it was uncorroborated by independent, objective evidence as required by state law. App. D at 114-15, (citing *In re Alvernaz*, 2 Cal. 4th 924, 938, 830 P.2d 747, 8 Cal. Rptr. 2d 713 (1992)) ("a defendant's self-serving statement – after trial, conviction, and sentence – that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence").

4. The state appellate court reasoned as follows:

> In this case, it is not necessary to make the factual determination as to whether trial counsel correctly communicated the terms of the plea agreement because regardless of any deficient performance on counsel's part, [Nunes] has not shown prejudice. . . . [Nunes] acknowledges that he had information from his mother before trial began that the terms of the plea offer differed from what counsel allegedly told him. His assertions that he was unable to raise the issue with his attorney before trial are simply not credible. Even if he could not reach his attorney on the telephone, he appeared in court with counsel before and during the trial. And even if counsel had refused to discuss the matter, [Nunes] has made no showing that he could not have raised the question with the trial court, asked for a clarification of the terms, and accepted the offer. In addition, [Nunes] was facing his fourth trial in this matter. The first two ended in hung

> juries; the third resulted in a reversal. A person in [Nunes's] situation would most likely believe that, at trial, he would have a very good chance of a voluntary manslaughter conviction. That he faced a mid-term of six years in prison, with credit for the approximately five years he had already been in prison if he were convicted of voluntary manslaughter following trial, as compared to 11 years in prison, including a waiver of all pre-sentence credits under the plea offer, further shows the likelihood a person in [Nunes's] shoes might well choose to go to trial rather than accept the plea offer.
>
> Thus, [Nunes's] opportunity to request a clarification of the terms of the plea offer prior to sentencing, along with the likely benefits of proceeding to trial, convince us that [Nunes] "has [not] established a reasonable probability that, with effective representation, he . . . would have accepted the proffered plea bargain." (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 938.) Consequently, because he has not shown that he would have accepted the plea bargain, the prejudice requirement described in *Alvernaz* has not been met.

App. D at 115 (last brackets original).

5. The California Supreme Court denied review. App. E.

6. Respondent Nunes filed a petition for writ of habeas corpus petition in the federal district court pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, § 104, 110 Stat. 1218. In 2001, the district court held an evidentiary hearing on the question of whether Nunes would have pleaded guilty if his trial counsel had properly communicated the plea bargain offer to him. Following the evidentiary hearing, the magistrate judge concluded that trial counsel had not accurately

communicated or explained the plea offer to Nunes, and that the state court decision was "erroneous." App. B at 48. Specifically, the magistrate judge ruled that "[b]ut for petitioner's trial counsel's failure to accurately communicate and adequately explain the plea offer to petitioner, [Nunes] would have taken the plea offer." *Id.* at 57.

7. The district court adopted in full the magistrate judge's Findings and Recommendations and ordered the State to reinstate its plea offer to Nunes of voluntary manslaughter as relief on his ineffective assistance of counsel claim. App. C.

8. On December 1, 2003, a divided panel of the Ninth Circuit Court of Appeals affirmed, but modified the district court's order by directing Nunes's release unless the State reinstated the plea offer. App. A at 19. The Ninth Circuit ruled that the state court's decision was objectively unreasonable because the record contained "ample" and "sufficient" evidence supporting Nunes's declaration. App. A at 14-15. In particular, the Ninth Circuit held "Nunes *did* present objective corroborative evidence to the state court, but the state court unreasonably rejected it as not credible and hence as unpersuasive." *Id.* at 14 n.6 (emphasis in original). The Ninth Circuit "stress[ed]" that

> the state [appellate] court decision was objectively unreasonable because that court made factual findings (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations) when it rather claimed to be determining prima facie sufficiency. By contrast, *if the state court had first conducted an evidentiary hearing and had then arrived at the same inferences and credibility determinations, we would not be second-guessing those procedures and results as objectively unreasonable.*

Id.. at 16-17 (emphasis added).

9. Citing Ninth Circuit case law, the court ruled that in the absence of a state evidentiary hearing, no presumption of correctness applied under 28 U.S.C. § 2254(e)(1), and therefore the federal court owed no deference to the state court's determination that the record failed to establish the necessary factual showing of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). App. A at 15 ("But with the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings — if that is indeed how those stated findings should be characterized — when they were made without such a hearing").

10. In dissent, Judge Graber found the Ninth Circuit's analysis and conclusions mistaken under the AEDPA, noting that the key facts on which the state court relied were "entitled to a presumption of correctness under 28 U.S.C. § 2254(d)(2) and (e)(1)" and were not "contradicted" at the federal evidentiary hearing. App. A at 23. Also, clearly established federal law did not require the state court to hold an evidentiary hearing for Nunes to develop his claim, and the "state court did not exceed the bounds of objective reasonableness in concluding that there was insufficient objective corroboration to trigger further inquiry." *Id.* at 24.

11. The State's Petition for Rehearing and Rehearing En Banc was denied on February 2, 2004. App. F.

REASONS FOR GRANTING THE PETITION

1. The opinion of the Ninth Circuit Court of Appeals adds to an existing conflict among the federal circuit courts concerning the authority of federal habeas courts to refuse deference under 28 U.S.C. § 2254(e)(1) to a state court's finding of fact in the absence of a prior state court evidentiary hearing. *Compare Valdez v. Cockrell*, 274 F.3d 941, 949-51 (5th Cir.

2001) (AEDPA deference applies to state court factual findings even in the absence of a full and fair hearing), *pet. for reh'g en banc denied*, 288 F.3d 702, *cert. denied*, 537 U.S. 883 (2002), and *Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000), *cert. denied*, 533 U.S. 949 (2001) (AEDPA requires presumption of correctness for state court's finding if supported by the record, even without a "'hearing on the merits of [the] factual issue'"), *with Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc) (pre-AEDPA standard applies unless state court holds evidentiary hearing), *cert. denied*, 124 S.Ct. _ (April 5, 2004) (No. 03-8055);[1] *see also Reid v. True*, 349 F.3d 788, 798 n.5 (4th Cir. 2003) (recognizing circuit conflict on deference to a state court factual finding absent an evidentiary hearing), *cert. denied*, 124 S. Ct. 979 (2003). *See* Sup. Ct. R. 10(a).

2. As the circuit conflict indicates, federal habeas courts encounter state court findings of fact which frequently are based on materials and record facts compiled other than through state evidentiary hearings. Consequently, resolution of the federal decisional conflict has national importance. It impacts directly whether the States are permitted to resolve factual disputes by the ordinary process of their criminal justice systems while retaining their entitlement under the AEDPA to federal court deference to those findings. *See* Sup. Ct. R. 10(c).

3. The Ninth Circuit's decision broadly rejects the presumptive validity of any state court ruling in a criminal case resting on an implied or express factual finding not resulting from a state evidentiary hearing. Under its decision, a state court's finding of mixed law and fact is objectively

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1. In *Bryan v. Mullin*, 335 F.3d 1207, it was the prisoner who had sought certiorari. The Tenth Circuit upheld the state judgment despite rejecting deference to state factual findings in the absence of a full and fair evidentiary hearing.

unreasonable if a federal court disagrees with the underlying factual inferences, even if no clear and convincing evidence rebuts those inferences. Indeed, the circuit decision, if left unreviewed, implicitly authorizes federal habeas courts to "second-guess[]" as objectively unreasonable any state criminal court ruling based on a factual inference or finding that did not result from an evidentiary hearing. *See* App. A at 17 ("if the state court had first conducted an evidentiary hearing and had then arrived at the same inferences and credibility determinations, we would not be second-guessing those procedures and results as objectively unreasonable"); *but see Lewis v. Jeffers*, 497 U.S. 764, 781-82 (1990) ("we have never required federal courts 'to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts'"). The adverse impact on state courts from the Ninth Circuit's decision to sanction such broad federal habeas review powers requires this Court's intervention. *See* Sup. Ct. R. 10(a).

4. Certiorari is also necessary because the decision below conflicts with the language and purpose of the AEDPA itself. The proper interpretation of that statute is a significant federal law question. *See* Sup. Ct. R. 10(c).

(a) The role of federal habeas corpus has always been "secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Bell v. Cone*, 535 U.S. 685, 693 (2002) (purpose of AEDPA is to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law"). The AEDPA was enacted to further this limitation, and with it the principles of comity, finality, and federalism. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *see also Williams v. Taylor*, 529 U.S. 420, 436 (2000). Accordingly, the AEDPA places "'new constraint[s] on the power of a federal habeas court to grant a state prisoner's

application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.'" *Woodford v. Garceau,* 538 U.S. at 206 (quoting *Williams v Taylor*, 529 U.S. at 412).

These new constraints advance old principles, particularly that "[t]he state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). Under 28 U.S.C. § 2254(e)(1), Congress has now expanded the standard of factual deference, and it has "placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Pre-AEDPA statutory law expressly prohibited federal habeas courts from deferring to state court determinations of fact if "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U.S.C. § 2254(d)(2) (1994 ed.) (repealed 1996), "the material facts were not adequately developed at the State court hearing," *id.* § 2254(d)(3), or "the applicant did not receive a full, fair, and adequate hearing," *Id.* § 2254(d)(6).

The AEDPA eliminated those limitations on deference. The present wording of 28 U.S.C. § 2254(e)(1) requires that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Under rules of statutory construction, a court must give effect to the clear meaning of an amended statute in which a previous limitation has been deleted. *See Union Bank v. Wolas,* 502 U.S. 151, 157-58 (1991); *see also Williams v. Taylor*, 529 U.S. at 431 ("We give the words of a

statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import" (internal quotation marks omitted)). The text of the AEDPA "contains no indication that § 2254(e)(1) was intended to have such a limited scope" or that its requirements are anything but "stringent." *Woodford v. Garceau*, 538 U.S. at 208. Consistent with these principles, both the Fifth and Seventh Circuits have found that the AEDPA requires deference to a state court factual finding despite the absence a full and fair hearing. *Valdez v. Cockrell*, 274 F.3d at 949-50 ("To reintroduce a full and fair hearing requirement that would displace the application of § 2254(e)(1)'s presumption would have the untenable result of rendering the amendments enacted by Congress a nullity"); *Mendiola v. Schomig*, 224 F.3d at 592 ("The former statute required deference to 'a determination after a hearing on the merits of a factual issue' unless one of eight conditions was satisfied. Section 2254(e), by contrast, omits any mention of a hearing").

(b) The express language of the AEDPA governs. If, as here, the state court's findings are presumptively correct under § 2254(e)(1), notwithstanding the absence of a full and fair state court hearing, the only factual issue for the federal court is whether the evidence that petitioner developed or diligently sought to develop in state court clearly and convincingly rebuts that finding.[2/] No such disposition was made in this case.

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2. A federal court is not barred from holding an evidentiary hearing under § 2254(e)(2) if the prisoner developed or diligently sought to develop in state court the factual basis for his claim. *See Williams v. Taylor*, 529 U.S. at 432-33. The State does not contend that Nunes failed to do so. In fact, Nunes developed a full record. He supplied three declarations to the state court from himself, his mother, and his appellate counsel which the state appellate court reviewed to find any objective, corroborating evidence showing he would have taken the plea offer. App. A at 21 n.13. In his federal appellate briefing, Nunes addressed the state court conclusion, not the adequacy of the record on which that conclusion rested. *See* Answer Br.

While the Court of Appeals concluded that Nunes produced "ample" and "sufficient" evidence to support his self-serving declaration under the AEDPA, App. A at 14-15, such evidence does not correspond to the presumption of correctness standard. Certiorari is justified to clarify the existing uncertainly in the AEDPA standard of review for state court factual findings in light of the Ninth Circuit decision and the conflicting opinions by the Fifth, *Valdez v. Cockrell*, 274 F.3d at 949-51, the Seventh, *Mendiola v. Schomig*, 224 F.3d at 592-93, and the Tenth Circuits, *Bryan v. Mullin*, 335 F.3d at 1215-16 (citing *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998)).

(Nunes) at 13 ("the factual evidence available to the state court demonstrated that there was a reasonable probability that, but for defense counsel's unprofessional errors, Mr. Nunes would have accepted the prosecutor's plea offer"), 26 ("The California Court of Appeal had the full record before it"), 31 ("The facts of this case and the evidence before the California Court of Appeal undermine any confidence that Mr. Nunes would have proceeded to trial had the prosecutor's correct plea offer been properly presented and explained to him"), 34 ("there were more than sufficient facts before the California Court of Appeal to demonstrate a 'reasonable probability' sufficient to undermine the appellate court's confidence that Mr. Nunes in fact knowingly, intelligently, and voluntarily rejected the actual plea offer").

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: April 16, 2004

Respectfully submitted,

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